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No. _____

In the Supreme Court of the United States

JANADRICK KEMONT DRONES
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When does a criminal defense attorney's failure to investigate the use of or use the testimony of an expert render the attorney's representation constitutionally deficient, in particular when the government's case is founded on one key piece of physical evidence (*e.g.*, an audiotaped phone conversation) that is capable of being analyzed by such an expert and when testimony of the same type has already gained judicial acceptance?

PARTIES TO THE PROCEEDING

The following individuals and entities were parties to the proceeding in the court below:

Petitioner is Janadrick Kemont Drones ("Drones").

Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Drones respectfully prays that a writ of certiorari be issued to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in this case. The U.S. District Court for the Southern District of Texas granted Drones' request for *habeas corpus* relief and vacated his conviction. The Court of Appeals reversed, determining that Drones' trial attorney had no obligation to investigate the use of an expert, despite the availability of expert spectrographic analysis showing that the central piece of evidence presented against Drones – a tape recording that allegedly contained his voice – was actually exculpatory.

Because the effectiveness of trial counsel is governed directly by the Constitution, the Court of Appeals' decision in Drones' case involves issues of the utmost federal importance given that more criminal proceedings than ever involve the use or availability of expert testimony. But the Fifth Circuit's decision does not adequately address when criminal defense counsel should constitutionally be required to investigate or seek out scientific or expert testimony. The decision warrants this Court's review.

OPINIONS BELOW

The Fifth Circuit opinion below (Pet. App. A) is reported at *United States v. Drones*, 218 F.3d 496 (5th Cir. 2000). The district court opinion (Pet. App. B) was not reported.

JURISDICTION

Drones seeks review of the Fifth Circuit's judgment in *United States v. Drones*, 218 F.3d 496 (5th Cir. 2000), which was entered on July 25, 2000. Drones timely filed petitions for panel and *en banc* rehearing, which were denied by the Fifth Circuit on September 19, 2000. Jurisdiction for this Court to review this case on a writ of certiorari vests under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Sixth Amendment to the United States Constitution and 28 U.S.C. § 2255.

The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The full text of 28 U.S.C. § 2255 is lengthy and is included in the appendix to this petition. *See* Pet. App. D.

STATEMENT OF THE CASE

This is a *habeas corpus* case brought by Drones because he was denied effective assistance of counsel. His appointed

attorney did nothing to investigate the government's key piece of evidence. Expert testimony *not* employed by Drones' attorney has since shown that this pivotal evidence was exculpatory.

The government alleged that Drones participated in a drug transaction. Beyond Drones' mere presence at the scene of the crime (a restaurant parking lot in the late afternoon), the only evidence linking Drones to the drug sale was an audiotaped phone conversation in which the transaction was allegedly arranged.

The government, offering the testimony of a police officer claiming he recognized Drones' voice, presented the tape as evidence that Drones was involved in the crime. Despite being informed by Drones that his voice was not on the tape, Drones' appointed trial counsel did absolutely nothing to investigate whether his client's voice appeared on the tape. Drones was convicted. Yet powerful exculpatory evidence that went uninvestigated and therefore untapped by Drones' counsel was available. In fact, in connection with Drones' post-conviction proceedings, the tape has been analyzed by experts for Drones *and* the government, who *both* have rendered strong opinions supporting Drones' contention that his voice does not appear on the tape.

I. Drones' arrest.

On April 25, 1995, Sergeant Gregory Haire ("Haire") of the Texas Department of Public Safety ("DPS") and two confidential informants set up an undercover crack cocaine purchase. Haire supervised the audiotaping of phone calls between the informants and suspected crack dealers during which a meeting was arranged to conduct the illegal transaction.

At around 4:30 p.m., Haire and the informants arrived at a Burger King restaurant in Houston, Texas. Vernon Freddie and Arnold Freddie, who are brothers, were seated in a two-door Mustang in the parking lot. As the drug deal transpired, Haire and other DPS agents arrested the Freddie brothers and also Drones, who was found standing in the parking lot outside the vehicle.

Drones and the Freddies were each charged with three counts of federal drug trafficking offenses, including conspiring to possess crack cocaine with intent to distribute and aiding and abetting in the possession of crack cocaine with intent to distribute.

II. Drones' claims of innocence.

Attorney Christopher Goldsmith ("Goldsmith") was appointed to represent Drones.

Long before trial, Drones told Goldsmith that he did not participate in the drug transaction and that his voice did not appear on the audiotape in which the transaction was allegedly arranged. Goldsmith listened to the audiotape himself but was unable to reach a conclusion or form an opinion as to whether Drones' voice appeared on the tape. At the subsequent Section 2255 hearing, Goldsmith testified that "[t]o specifically say it was or was not Mr. Drones, I wasn't qualified to form an opinion. It might have been, it might not have been. I couldn't make that decision either way."

Nevertheless, Goldsmith admitted that in the months before trial he never attempted to confirm or deny whether Drones' voice was on the tape. He never played the tape to anyone familiar with Drones' voice; he never asked Drones to read from the transcript for comparison purposes; he never took an

exemplar of Drones' voice to compare to the voice on the tape; he never researched or investigated the possibility of obtaining expert testimony, conducted legal research, contacted an expert, or looked into whether one was available (despite knowledge that such experts exist); and he never attempted to undertake even a preliminary assessment, scientific or otherwise, to inquire into this admittedly essential issue.

Before trial, Goldsmith spoke with Drones' wife, Krisna Brown-Drones ("Brown-Drones"), several times but never asked her to listen to the tape or help identify Drones' voice even though he called her as a witness at trial.[1] Goldsmith also spoke with Lt. Col. Dave Johnson ("Johnson"), Drones' grandfather, and never asked him to listen to the tape or to help identify Drones' voice. Johnson attended Drones' trial but was not asked to testify.[2]

III. Drones' trial.

On September 25, 1995, Drones and Vernon Freddie (Arnold Freddie plead guilty to all charges) were tried together in the U.S. District Court for the Southern District of Texas. At trial, the government presented three witnesses, only one of whom testified about Drones' alleged involvement in the crime: Haire.

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[1] At the Section 2255 hearing, the tape was played for Brown-Drones, who testified that she did not hear Drones' voice. She was also played a composite tape, which contained alternating excerpts of both Drones' voice and the voice on the government's tape. She was able to identify which voice was Drones' in each instance.

[2] During the Section 2255 hearing, the tape was played for Johnson, and he testified that Drones' voice was not on the tape.

Haire testified that he met with the confidential informants about setting up the undercover crack buy. He then tape recorded the informants' calls with the suspects and went to the scene of the drug buy where they saw the Freddies' car in the parking lot. Haire said he observed Drones in the driver's seat of the Freddies' car at some point, but not during the drug transaction or the time of arrest. One of the informants approached the Freddies' car and got in. Vernon Freddie then weighed some crack cocaine on a scale, and a short time afterward DPS agents converged on the scene. Haire testified that he found Drones standing in the parking lot at the time of the arrest.

At trial, the tape of the phone conversations was played to the jury. Haire – who had never met or spoken with Drones before making the arrest – testified that he "recognized [Drones'] voice as being the same voice that was previously recorded" and that one of the voices on the tape "appeared to be" Drones' voice.

Before Goldsmith put on Drones' case, he moved for judgment of acquittal, arguing that "the tape and the fact that Mr. Drones is at the scene is basically all [the government has] got." The court denied the motion, and Drones' counsel then called three witnesses: Vernon Freddie, Arnold Freddie, and Brown-Drones.

Vernon Freddie testified that he knew Drones because they both lived in the same neighborhood. He had not seen Drones on the day of the arrest until he saw Drones walking up to the Burger King through the parking lot. He and his brother Arnold had arrived earlier. Vernon saw Drones, they spoke, and Vernon introduced Drones to his brother. They were standing near the Freddies' Mustang at the time. He testified that during the drug transaction one of the confidential informants got in the car and

sat in the driver's seat while Vernon weighed an ounce of crack on the scale and that Drones was never in the car but was instead standing behind it. Vernon Freddie testified that Drones was not part of the drug transaction.

Arnold Freddie testified that he had never met Drones before being introduced in the Burger King parking lot. He said that Drones was never in the car, that Drones was standing behind the car, and that the confidential informant sat in the front seat while Vernon was weighing the cocaine. Arnold Freddie also testified that Drones was not part of the drug transaction.

Brown-Drones testified that she and Drones were together on the day of the arrest at her sister's house, which did not have a phone, until around 4:30 p.m., which was after the time that the tape-recorded phone conversations took place. At that time, Drones left to walk to get something to eat.

IV. Jury instructions and deliberations.

The jury was instructed, among other things, that "mere presence at the scene of a crime and knowledge that a crime is being committed is not sufficient to establish that the defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator." During deliberations, the jury asked for the transcripts of the tape-recorded phone calls. Because the transcripts were jury aids and were not admitted, the court gave the jury the tape instead. Shortly thereafter, the jury returned with a guilty verdict.

V. Judgment of acquittal and appellate reversal.

Following trial, the district court reconsidered and granted Drones' motion for judgment of acquittal, finding that Drones' voice was probably not on the tape and that "the evidence is insufficient to sustain a conviction." The United States appealed that ruling. On July 2, 1996, the Fifth Circuit reversed and remanded, instructing the district court to reinstate the guilty verdict. On remand, the district court sentenced Drones to serve seventeen and one-half years in confinement and a five-year term of supervised release.

VI. Section 2255 hearing.

Drones timely filed a motion under 28 U.S.C. § 2255 asserting that he was denied effective assistance of counsel at trial. As discussed above, Drones has always maintained that his voice does not appear on the audiotape that the government used to convict him. In short, Drones' claim is that, although the tape was the only piece of independent evidence linking him to the alleged conspiracy, his trial counsel did nothing to investigate whether his voice was on the tape.

On November 6, 1998, the district court conducted a hearing on Drones' Section 2255 motion on the "issue of whether counsel's failure to investigate exculpatory evidence regarding Drones' identity rendered his performance constitutionally deficient." Drones called four witnesses: Goldsmith (Drones' trial counsel); Johnson (Drones' grandfather); Brown-Drones (Drones' wife); and Steve Cain, a forensic scientist and voice identification expert. The government called Bruce Koenig, a forensic scientist.

The testimony of Goldsmith, Johnson, and Brown-Drones has already been described above. The remaining two witnesses

(Cain and Koenig) at the Section 2255 hearing were experts in voice identification analysis.

A. Voice identification analysis in general.

In rendering a voice identification opinion, the examiner will obtain a voice sample, called an exemplar, in which the suspect repeats the words or phrases spoken in the questioned recording multiple times.

The questioned recording and the exemplar are then checked for quality and inputted into a computer-based recording system, or spectrograph. The spectrograph provides an analysis and a print out of various aspects of the recorded speech, such as vocal frequencies and amplitudes. The examiner next conducts a spectrographic and aural examination of each of the words or phrases on the questioned recording as compared to their counterparts on the exemplar.

There are seven possible conclusions a voice identification expert can reach: "positive identification," "probable identification," "possible identification," "inconclusive," "possible elimination," "probable elimination," and "positive elimination." Specific criteria must be met before an analysis can be categorized. A "positive elimination" or "positive identification" is extremely rare. A "possible elimination" is considered exculpatory.

A "probable elimination" is considered a strong exculpatory opinion (*i.e.*, that it is not the suspect's voice). In order to render a "probable elimination," at least 80% of the comparable words (in comparing the questioned recording and the exemplar) must be very dissimilar both aurally and spectrally, producing not less than 15 words that do not match.

B. Voice identification testimony at the section 2255 hearing.

At the hearing, Drones called Steve Cain ("Cain"), a forensic scientist. Cain's qualifications are extensive, including degrees in forensic science, more than 11 years in the forensic crime laboratory of the United States Secret Service (where he was, among other things, a voiceprint examiner), and three years in the forensic laboratory of the IRS Criminal Investigative Division national crime lab (serving in part in the Voiceprint Unit).

Cain has written articles on voiceprint analysis, including an article published in a 1988 U.S. Department of Justice publication. Cain has testified in court in approximately 100 cases on the issue of spectrographic voice identification, the majority of which were tried to juries. These cases encompass both state and federal courts in jurisdictions across the United States.

Cain testified that in his experience, voice identification analysis is reliable and has a "high accuracy rate when it has been conducted properly with suitable evidence." In fact, in 1986, a study of 2,000 voice comparisons made by FBI examiners "under actual law enforcement conditions" revealed only 2 false eliminations and 1 false identification (resulting in an observed error rate of 0.53% and 0.31%, respectively). Another study at Michigan State University revealed error rates of only 2-5%.

In this case, Cain obtained a copy of the tape that was used to convict Drones, and then obtained an exemplar of Drones' voice. After checking both the prosecution's tape and the

exemplar tape for quality, Cain conducted an aural and spectrographic examination.

After reviewing the evidence and conducting his examination, Cain concluded that there was a "probable elimination of Mr. Drones as being responsible for making any of the two questioned telephone calls," and that:

> Generally what happened was that no matter how many times I had Mr. Drones repeat the same phrases, questioned phrases, when you look down below, for example, on these two spectrograms and look for the counterparts of the same word, they just don't look anything like the exemplar above. They are just different. Not only do they look different, but they also sound different . . ..

Cain also opined that he might have been able to arrive at a positive elimination had he been provided with the government's original tape.

The government's witness, Bruce Koenig ("Koenig"), a 20-plus year veteran of the FBI, is a private consultant in the area of, among other things, voice comparison and the authentication of tapes. Koenig was also the author of the 1986 FBI study on spectrographic voice analysis (discussed above) that reported a false elimination error rate of only 0.53% and a false identification error rate of only 0.31%.[3]

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[3] A false elimination occurs when the two voice samples being compared come from the same person and the examiner inaccurately concludes that they came from two different people. A false identification occurs when the two voice samples being compared come from different people and the examiner inaccurately concludes that they came from the same person.

Following receipt of Cain's report, the government hired Koenig to conduct a voice identification comparison of Drones' voice and the voice on the prosecution tape. After analyzing the evidence and conducting an aural and spectrographic examination, Koenig issued a report in which he reached the same "probable elimination" conclusion that Cain, Drones' expert, reached. Koenig's report reads in relevant part:

> The unknown voice in conversation number one was found to have numerous aural and spectrographic differences when compared with the known voice of Mr. Drones, resulting in a Probable Elimination decision.
>
> * * *
>
> Voice identification using the spectrographic method is not considered a completely conclusive technique; however, the results are considered meaningful when obtained following accepted standards.

Koenig's report also revealed that his "probable elimination" results were confirmed by yet another examiner, Steven Killion, a former agent in the FBI's forensics laboratory.

VII. The district court's findings and conclusions.

On March 18, 1999, the district court issued an extensive opinion finding that "Drones' trial counsel was constitutionally deficient, which prejudiced Drones' defense," and therefore vacating his conviction. Pet. App. B. The district court found, among other things, that

- "Given the centrality of the identification of Drones' voice to the Government's case . . ..

Goldsmith's performance was deficient in not making a preliminary investigation into the identity of the voice on the tape";

- "Goldsmith made no effort to ascertain that an investigation of the tape would be 'unnecessary,' much less conduct a 'thorough investigation.'"; and

- Goldsmith "did not make a reasonable, informed choice to forego investigation of the tape . . . a 'critical piece of evidence' . . . a piece of evidence *central* to determining his client's guilt or innocence."

VIII. The Fifth Circuit opinion.

Although acknowledging that Goldsmith's representation was seriously problematic (*see, e.g., Drones*, 218 F.3d at 500 ("Goldsmith failed to make any, let alone a reasonable, investigation into the identity of the unknown voice on the government tapes")) and that his failure "to investigate the availability of expert spectrographic analysis of the tapes" was "troubling" (*id* at 501), a panel of the Fifth Circuit Court of Appeals reversed the district court's judgment.

Several erroneous statements of fact regarding Drones' alleged participation in the drug transaction infect the Fifth Circuit's conclusions. In particular, the court asserts that Drones was observed to be in the car while the drugs were being weighed. *Drones*, 218 F.3d at 497, 504-05. This allegation finds *no support in the record.* No one, including Haire, testified that Drones was in the car during the drug transaction. No record evidence exists that Drones was in the car while the drug transaction was taking place or while the crack cocaine was being weighed.

Moreover, as discussed below, the Fifth Circuit's opinion sets a standard that threatens to ensure that criminal defendants such as Drones will rarely be entitled to the benefit of exculpatory scientific evidence.

REASONS FOR GRANTING THE PETITION

I. As Drones' case demonstrates, effective assistance of counsel sometimes calls for investigation into the availability and retention of an expert.

The central evidence linking Drones to the alleged drug conspiracy was an audiotaped phone conversation. As noted above, the jury in Drones' trial was instructed that "mere presence at the scene of a crime and knowledge that a crime is being committed is not sufficient . . . unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator." Without the tape, the government could have proven presence, and *possibly* knowledge, but not participation. Thus, the tape was critical to the prosecution.

The only evidence linking Drones to the tape was a police officer's testimony that he recognized Drones' voice and that one of the voices on the tape "appeared to be" Drones' voice. Long before trial, Drones told his attorney, Goldsmith, that it was not his voice on the tape. Goldsmith admitted he "wasn't qualified to form an opinion" and that he "couldn't make that decision" as to whether Drones' voice was on the tape. Yet Goldsmith did absolutely nothing to research or investigate this issue. Thus, Drones received no assistance in confronting the prosecution's key proof.

Meanwhile, strongly exculpatory scientific evidence, that had already gained federal judicial acceptance, was available to

assist Drones and refute the cornerstone of the government's otherwise weak case.

At the time of Drones' trial, four United States appellate courts and one United States district court had unambiguously held that expert voice identification expert testimony was admissible. *See United States v. Smith*, 869 F.2d 348, 352-355 (7th Cir. 1989); *United States v. Williams*, 583 F.2d 1194, 1197 - 1201 (2d Cir. 1978); *United States v. Baller*, 519 F.2d 463, 465-67 (4th Cir. 1975); *United States v. Franks*, 511 F.2d 25, 33-34 (6th Cir.1975); *United States v. Maivia*, 728 F. Supp. 1471, 1472-78 (D. Haw. 1990).[4] The *only* federal court that had refused to admit this evidence later called its own ruling into question. *See United States v. McDaniel*, 538 F.2d 408, 413 (D.C. Cir. 1976) (noting with reservations that the court was bound by its prior ruling that evidence was inadmissible).

As discussed above, the voice identification analysis presented at the Drones' Section 2255 hearing shows that the physical evidence used to convict Drones could actually have been used to exonerate him. Indeed, both Drones' expert and the government's expert reached the same conclusion after analyzing the tape. Yet this evidence went untapped, and Drones paid a very dear price.

A panel of the Fifth Circuit reversed the district court's judgment that Drones' trial counsel rendered ineffective assistance of counsel in failing to investigate or present expert

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[4] This Court cited two of these cases with approval in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) (citing with approval *Smith* and *Williams*). The only reported decision on the issue since *Daubert* was announced affirmed the rationale used by the four federal circuit courts. *State v. Coon*, 974 P.2d 386, 388, 400-02 (Alaska 1999) (expert testimony admitted was from Steve Cain, the same expert who offered testimony in support of Drones in this case).

testimony to challenge the government's assertion that his voice was on the tape. In doing so, the Fifth Circuit set a precedent that, unless corrected, will operate to deprive criminal defendants such as Drones of appropriate access to expert testimony necessary to assist in their defense.

II. The Sixth Amendment, in terms of requiring counsel to investigate the use of, or use, scientific or expert testimony, should be construed more liberally than the Fifth Circuit did below.

Under this Court's longstanding teaching in *Strickland v. Washington*, 466 U.S. 668, 694 (1984), in order to satisfy the Sixth Amendment counsel has always had "a duty to make reasonable investigations." And – as in this case – if counsel makes no investigation, there must be a "reasonable decision that makes particular investigations unnecessary." *Id.* The Fifth Circuit's decision marks a departure from these general principles where expert testimony is involved.

The use of scientific and expert testimony in both civil and criminal cases has become increasingly commonplace. Indeed, in many instances there would be little room for dispute among practitioners that the retention of an expert would not only be advisable, but actually required, in order to render proper representation. Yet at the same time there is little if any guidance, and certainly no clearly articulated standard, as to the obligations of counsel under the Sixth Amendment when it comes to consulting expert witnesses.

Drones respectfully submits that the time has come for this Court to inform counsel and the courts as to precisely what is required in this regard in order to satisfy the Constitution's mandate that criminal defendants receive effective assistance of

counsel. Put another way: Under what circumstances is counsel required to investigate the use of, or use, scientific or expert testimony?

The Fifth Circuit's unduly restrictive decision would support trial counsel's failure to look into the availability of expert testimony in almost any case. Indeed, in rendering it almost impossible for a criminal defendant to be ensured the potential benefit of critical scientific assistance, the Fifth Circuit's opinion marks a significant departure from the general *Strickland* principle that counsel act reasonably. In its place is a decision that limits the duty to investigate the use of scientific or expert assistance beyond any standard of reasonableness.

A reading of the Fifth Circuit's decision suggests that unless (1) there is no other significant evidence against the client, (2) the admissibility of the expert testimony in question is firmly established by Supreme Court (or perhaps Fifth Circuit) precedent, *and* (3) the expert testimony is almost incontrovertible, trial counsel can simply ignore researching or inquiring into these sources of potentially exculpatory evidence.

For example, in Drones' case:

- There was little if any evidence linking Drones to the drug conspiracy. Essentially the government had (1) Drones' presence at the scene of the crime (which was a public place during the afternoon) and (2) the tape of the phone conversations;[5]

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[5] As discussed above, the Fifth Circuit's repeated assertion that there was "significant circumstantial evidence" linking Drones to the conspiracy, and in particular that he was supposedly seated in the car while the drugs were being weighed, is simply wrong. No record evidence exists that Drones was in the car while the drug transaction was taking place or while the crack cocaine was being weighed.

- Voice identification analysis was hardly novel. Indeed, its admissibility was well established by federal precedent. At the time of Drones' trial, it was supported by four U.S. appellate decisions and one U.S. district court decision. It was also admitted by the district court in this case; and

- It is undisputed that trial counsel did nothing to investigate whether Drones' voice was on the tape.

Despite all that, in an opinion marked by internal inconsistencies, the Fifth Circuit somehow concluded that counsel's failings were inconsequential. After noting the numerous fundamental errors that Goldsmith made, the panel excused his deficient performance apparently based on the so-called "ambiguous" state of the law on spectrographic voice identification and because it apparently is not persuaded that the evidence would be persuasive to a jury. *See Drones*, 218 F.3d at 503-04. However, the law was not "ambiguous" at all and the district court both admitted the evidence and found it persuasive. (Significantly, the Fifth Circuit's opinion did not find that the district court's acceptance of and reliance upon Drones' expert testimony was error.)[6]

One reads the Fifth Circuit decision and can sense how hesitant the court was to issue a ruling that would be too quick to constitutionally require counsel to consult an expert. *See, e.g.*, footnote 5 above. Yet today's reality is that counsel in

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[6] Paradoxically, the panel decision concedes that Goldsmith's "failure to investigate can be deficient . . . if such failure leads to the exclusion of admissible evidence" (*Drones*, 218 F.3d at 502 n.7) and that Goldsmith's "failure to investigate can be constitutionally deficient only if it results in the exclusion of competent evidence." *Id.* at 502.

courts throughout the country routinely employ experts to assist their clients. While Drones does not remotely suggest that experts should be required in every case, or that counsel should be required to consult unaccepted or "junk" science, the constitutional mandate of assistance of counsel has to be more generous than the Fifth Circuit's stingy interpretation. The need for an expert (and the crucial support it turns out the expert would have provided) was particularly compelling in Drones' case.

The evidence that the government used to convict Drones also contained the key to his acquittal. This never came to light because counsel never bothered to have the evidence properly analyzed by available scientific means. In a case where the outcome hinges on a single piece of physical evidence (that incidentally was created and offered by the government), where there is little other corroborating evidence, and where testimony of the type at issue finds ample support in existing law, counsel should be required to investigate the use of an expert.

Drones respectfully submits that the issues presented in this case are of exceptional importance. This is especially so in light of the fact that more and more criminal proceedings involve the use or availability of expert testimony and yet the Fifth Circuit's decision does not adequately address, and to the extent it does it unreasonably restricts, when criminal defense counsel should be constitutionally required to investigate or seek out scientific or expert testimony.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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